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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. 398

HAZEL-ATLAS GLASS COMPANY, Petitioner,

v.

HARTFORD-EMPIRE COMPANY, Respondent.

BRIEF FOR RESPONDENT, HARTFORD-EMPIRE COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November, 1943.

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Official Reports of Decisions.

The decision of the court below is reported at 137 F. 2d 764 and appears at page 240 of the Record. That decision disposed not only of this case, but also a companion one, *Shawkee Manufacturing Company et al., petitioners, v. Hartford-Empire Company,* now the subject of a petition to this Court, No. 423 at this Term.

The earlier decision of the Circuit Court of Appeals, upon which was based the judgment sought to be reopened by the present proceeding, appears at 59 F. 2d 399. That opinion was filed May 5, 1932 and judgment was entered on the same day.

Counter-Statement of the Case.

For convenience and brevity, petitioner will be referred to as "Hazel", respondent as "Hartford", the earlier litigation reported at 59 F. 2d 399 as "the Hazel infringement suit", and the petitioners at No. 423 as "Shawkee".

Although entitled below in the Hazel infringement suit (disposed of by the Court of Appeals in 1932), the petition for certiorari seeks to bring before this Court only the proceedings on a "petition for leave to file a bill of review", filed in November 1941, but amended in January 1942 by striking out the original prayers and asking (1) that the Court of Appeals itself determine whether or not, on the ground of alleged fraud, it should set aside the judgment it had entered in the Hazel infringement suit in 1932, vacate the final decree entered therein in the District Court, recall the mandate and restore the case to the docket of the Court of Appeals for reargument, or, alternatively (2) for leave to take proceedings in the District Court for setting aside and vacating the decree.

In its opinion filed June 30, 1943, the Court of Appeals—opinion by Judge JONES, Judge MARIS concurring, Judge BIGGS dissenting—denied the petition, holding:

(1) that the petition was without merit because the Clarke article was not material to the 1932 decision in the Hazel infringement suit;

(2) that Hazel had full knowledge of the situation, even during the trial of the infringement suit in 1929,—"Not possibly can the information as to the facts attending the publication of the Clarke article be deemed to rate as after-discovered evidence so far as either Hazel-

Atlas or Shawkee is concerned" — and that Hazel had been so derelict that it had no standing to seek the relief for which it petitioned; and

(3) that, even were the court to conclude otherwise than against Hazel on the merits, yet, the term in which the Court of Appeals had decided the infringement suit having long since expired, the Court of Appeals would be without power itself "to vacate or set aside the decrees of the District Court which reside therein unaffected by any retention of jurisdiction in this court".

Neither of the first or second grounds of the decision below is presented as a reason for granting certiorari. Each is purely FACTUAL, *and alone is dispositive of the case.*

Since an extensive statement of fact is not essential for a disposition of the petition, we confine ourselves here to a brief recital of the facts as found by the court below. We have set out in an Appendix a detailed factual statement, a correction of Hazel's statement of the case as contained in its petition, and a statement of factual errors included in the dissenting opinion below.

The controlling facts found by the Court below.

(1) In the Hazel infringement case the Peiler patent in suit was held by the Court of Appeals (one judge dissenting) to be a pioneer patent and infringed by the Hazel feeders; 59 F. 2d 399, R. p. 241 (the District Court's opinion had held the patent not infringed but had not questioned its validity; 39 F. 2d 111). While the Clarke article was quoted and discussed in the Court of Appeals' opinion, yet, "wholly apart" from it, the ma-

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* Emphasis ours throughout this brief.

jority of the court below "upon turning to *'the proofs'*," drew their own conclusions in support of the action which the court thereupon took. * * * what was held in the Hazel-Atlas case was the court's independent judgment, regardless of the Clarke article" (Opinion, R. p. 248).

(2) The charge of fraud goes merely to the *authorship* of the Clarke article, not to its *substance,* which is unchallenged; "No substantial complaint has yet been made that what the article contained in material part, namely, the ascendency of gob-feeders over stream feeders, was factually false" (Opinion, R. pp. 247-8).

The Clarke article, as published, was entirely true. Petitioner has never contended otherwise.

(3) In 1933, while the Court of Appeals had the Shawkee appeal under consideration, facts as to the origin of the Clarke article were brought to the attention of the Court of Appeals by counsel for Shawkee. As to that, the opinion below says "There can be no doubt that the matter received the attention of all of the members of the court which had heard the Shawkee, as well as the Hazel-Atlas case" (Opinion, R. p. 247). Moreover, Judge WOOLLEY, who had dissented in the Hazel infringement suit, separately concurred in the Shawkee decision on the ground that he felt bound by the majority opinion in the Hazel case (68 F. 2d 727, R. p. 248), ignoring the challenge as to the authorship of the article and thus making it plain that he regarded it as having played no material part in the majority decision in the Hazel case (Opinion, R. p. 248).

(4) Counsel for Hazel "were aware at least by the time of the trial" of the Hazel infringement suit in April

1929 of the facts as to the authorship of the Clarke article (Opinion, R. p. 243). Both Clarke and Hatch had freely stated the facts in September 1926 and February 1928, respectively, and these admissions were imparted to counsel for Hazel at the time of the trial at Pittsburgh in 1929 (Opinion, R. pp. 243-4; and see the affidavit of Edmund P. Wood, Esq., "whom both sides accredit", Opinion, R. pp. 211-214).

Counsel for Hazel "deliberately chose not to go into the matter of the article's real authorship" (Opinion, R. p. 243) fearing that if they should do so they would merely emphasize the truth of it, and consequently "an attack on the article might be a boomerang" (R. p. 213).

When the briefs were filed in the Court of Appeals, Hazel's counsel still refrained from challenging the article except to criticize a *chart* appended to it on the ground that it was "misleading" and "not competent evidence" against Hazel (Opinion, R. p. 244).

Immediately after the 1932 decision of the Court of Appeals in the Hazel infringement suit, counsel for Hazel obtained affidavits *entitled in that appeal* (R. p. 211) and setting forth the facts as to the authorship of the article (Opinion, R. p. 244). These affidavits, however, were not brought to the attention of the Court of Appeals, nor was any other timely representation made to it concerning the Clarke article. No petition for rehearing, based on this or any other ground, was filed, despite five extensions of time. Within the time allowed by the last extension Hazel entered into a cross-licensing agreement with Hartford (Opinion, R. p. 245). Although that agreement contains a provision giving Hazel the right to cancel at any time (R. p. 185), Hazel has never cancelled or renounced it.

Summary of Argument.

I

The judgment of the court below was based on three separate and distinct grounds:

First, that the Clarke article was not material to the 1932 decision of the court below;

Second, that the evidence relied on by petitioner cannot possibly qualify as after-discovered evidence; and

Third, that even were the Court to conclude otherwise than against Hazel on the first two grounds, yet, the term in which the Court of Appeals had decided the infringement suit having expired, the Court of Appeals would be without power itself to vacate or set aside the decrees residing in the District Court.

Petitioner does not contend that either of the first two grounds of decision warrants review by this Court — neither is presented as a reason for granting the writ. Certiorari is therefore inappropriate. Petitioner is in reality attempting to use the third and subsidiary ground of the decision below as a lever to obtain a review of the first two grounds of that decision, which grounds were purely factual and dispositive of the case. This Court does not review controverted questions of fact on certiorari.

II

The decision of the court below is not in conflict with the decisions of other Circuit Courts of Appeals. On the contrary the court below followed the rule, enounced by this Court and uniformly recognized, limiting the

power of appellate courts to recall their mandates. The conflict alleged by petitioner between the decision of the court below and the *Art Metal* cases in the Second Circuit is non-existent in fact. The court below specifically considered the *Art Metal* cases and correctly differentiated this case from them. The Second Circuit Court of Appeals states and follows the general rule, also followed by the court below in the instant case, in *Nachod et al. v. Engineering & Research Corporation,* 108 F. 2d 594, decided immediately after the *Art Metal* cases.

III

Petitioner's contention that the judgment below is in conflict with *United States v Throckmorton,* 98 U. S. 61, and *Marshall v. Holmes,* 141 U. S. 589, is without merit. Neither of those cases is authority for the proposition that an appellate court has the power to recall its mandate after the expiration of the term nor in conflict with the established rule that no such power exists. Those were cases dealing with original bills brought in courts of original jurisdiction. The court below specifically considered both of them and showed their inapplicability. Petitioner was not prevented from fully exhibiting its case in the infringement suit.

IV

There is no merit to petitioner's contention that the decision of the court below raises a jurisdictional question of great importance. Petitioner failed to present to the court below a case even *prima facie* sufficient to move that court to give leave to file a bill of review in the District Court and cannot in these circumstances be heard to say that an important jurisdictional question arises because the Court of Appeals also refused to re-

call its mandate and rehear the infringement suit ten years after the term had expired.

V

There is no question of public interest involved. The decision in the infringement suit was *in personam* only, not *in rem*. Any member of the public not a party or privy to the infringement suit may defend against the Peiler patent on any grounds it sees fit. Even the petitioner is free to bring an original suit in a court of original jurisdiction to relieve itself of the judgment. The petition is in reality only a belated attempt to obtain a re-argument of the issues litigated in the infringement suit on the basis of the Clarke article, despite the fact that, although petitioner had full knowledge regarding its authorship at the time of the trial of the infringement suit, petitioner elected not to challenge it.

ARGUMENT

First Point.

The judgment below was based on three separate and distinct grounds. Two of these grounds, either of which was sufficient fully to dispose of the case, are not presented as reasons for granting the writ; therefore, certiorari is inappropriate.

The court below held (1):

> "But, wholly apart from the Clarke Article, the majority of the Court in the Hazel-Atlas case, upon turning to 'the proofs', drew their own conclusions in support of the action which the court thereupon took. * * * such was the primary basis of the majority opinion in the Hazel-Atlas case * * *.

* * * what was held in the Hazel-Atlas case was the court's independent judgment, regardless of the Clarke article." (Opinion, R. p. 248)

The court below further held (2):

"Not possibly can the information as to the facts attending the publication of the Clarke article be deemed to rate as after-discovered evidence so far as * * * Hazel-Atlas * * * is concerned." (Opinion, R. p. 247)

The court below then said (3):

"So far we have considered this matter on the merits of the petitioners' allegations and their standing to seek the relief for which they petition; *and we conclude against them on both grounds.*" (Opinion, R. p. 249)

The court then went on to say that, even had its conclusions in such regard been otherwise, it still lacked power to vacate the decree of the District Court, the mandate having gone down, and the term in which the judgment of the Court of Appeals was entered having long since expired.

Petitioner does not contend that either of the first two grounds of decision warrants review by this Court —neither of them is presented as a reason for granting the writ. Certiorari is therefore inappropriate:

"It is well settled that this Court confines itself to the ground upon which the writ was asked or granted, the review here being no broader than that sought by the petitioner. Clark v. Williard, 294 U. S. 211, 216; Helvering v. Tex-Penn Oil Co., 300 U. S. 481, 498; Washington V. and M. Coach Co. v. Na-

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tional Labor Relations Board, 301 U. S. 142, 146." *Helis v. Ward,* 308 U. S. 365, 370.

"This Court confines itself to the ground upon which the writ was asked or granted. Alice State Bank v. Houston Pasture Co., 247 U. S. 240, 242. Clark v. Williard, 294 U. S. 211, 216." *Morehead v. New York ex rel. Tipaldo,* 298 U. S. 587, 604-5.

"But as that is not the ground upon which the writ of certiorari was asked or granted, we confine our discussion to the matter relied upon in asking the intervention of this Court. Hubbard v. Tod, 171 U. S. 474, 494." *Alice State Bank et al. v. Houston Pasture Co.,* 247 U. S. 240, 242.

Accordingly, should this Court grant the writ and decide "the ground upon which the writ was asked" favorably to Hazel, the judgment below would still stand because its first two grounds of decision—or either of them—fully disposed of the controversy. Certiorari is consistently denied in such cases, or, if granted under misapprehension, is promptly revoked:

"The decision of this case does not require a decision of the questions which are presented in the petition for certiorari *because of which the writ was granted,* and the certiorari heretofore granted in this case is therefore revoked upon the authority of Southern Power Co. v. North Carolina Service Co., 263 U. S. 508." *United States v. McFarland,* 275 U. S. 485.

In *Keller v. Adams-Campbell Co.,* 264 U. S. 314, this Court granted certiorari in a patent infringement suit to review the question of scope of intervening rights—a question sufficiently important to justify the granting

of the writ. On the hearing, it developed that although the lower courts had passed upon the question of intervening rights, they had also decided the question of infringement, which alone was sufficient to dispose of the case. In these circumstances, this Court said:

"The result is that an order must be entered dismissing the writ of certiorari as improvidently granted * * *." (264 U. S. at 320)

Petitioner is in reality attempting to use the third, and subsidiary, ground of the decision below as a lever to obtain a review of the first two grounds of that decision, which grounds were purely factual and each of which was fully dispositive of the case. But this Court does not review on certiorari controverted questions of fact:

"This writ must be dismissed * * *.

"The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use—*primarily a question of fact.* That is not the ground upon which we granted the petition and if sufficiently developed would not have moved us thereto." *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 509.

"Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 178.

"We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U. S. 220, 227.

As this Court said in *Magnum Co. v. Coty*, 262 U. S. 159, 163:

> "The jurisdiction to bring up cases by certiorari * * * was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

Second Point.

The judgment below is not in conflict with the decisions of other Circuit Courts of Appeals.

The court below, after disposing of the case on the merits, held that it lacked power to recall its mandate, or to vacate the District Court's decree entered pursuant thereto, after the expiry of the term in which the mandate had issued and the judgment had been entered. The court below (R. p. 249), far from creating a conflict with the Second Circuit Court of Appeals, as contended by petitioner (Petition. p. 13), adhered to the general rule, following and quoting from the same court's decision in *Nachod et al. v. Engineering & Research Corporation*, 108 F. 2d 594:

> " 'Our term having expired since the mandate went down, we have no power to recall it.' (citing cases)".

Thus both Courts of Appeals reiterate and follow the fundamental principle enounced by this Court in *Bronson v. Schulten*, 104 U. S. 410, 415; and uniformly observed by the Circuit Court of Appeals, *e.g.*:

FIRST CIRCUIT:

Casey v. Sterling Cider Co., 15 F. 2d 52;
Hart et al. v. Wiltsee et al., 25 F. 2d 863.

SECOND CIRCUIT:

Watts, Watts & Co., Limited, v. Unione Austriaca Di Navagazione, 239 Fed. 1023;

Sundh Electric Co. v. Cutler-Hammer Mfg. Co., 244 Fed. 163, 170;

Dobson v. United States, 31 F. 2d 288; certiorari denied 278 U. S. 653.

THIRD CIRCUIT:

Realty Acceptance Corp. v. Montgomery, 51 F. 2d 642; affirmed 284 U. S. 547.

FOURTH CIRCUIT:

Foster Bros. Mfg. Co. Inc. v. National Labor Relations Board, 90 F. 2d 948.

SEVENTH CIRCUIT:

Hawkins v. Cleveland, C., C. & St. L. Ry. Co., 99 Fed. 322.

EIGHTH CIRCUIT:

Guaranty Trust Co. of New York et al. v. Minneapolis & St. L. R. Co. et al., 98 F. 2d 345, 346-7;

Reynolds et al. v. Manhattan Trust Co. et al., 109 Fed. 97, 98-99.

The sole alleged conflict between circuits asserted by petitioner (Petition p. 13, pp 17-18) is with the decisions of the Circuit Court of Appeals for the Second Circuit, antecedent to the *Nachod* case above cited, in *Art Metal Works, Inc. v. Abraham & Straus, Inc.,* 107 F. 2d 940, 107 F. 2d 944, certiorari denied 308 U. S. 621. The *Art Metal* cases, however, are not germane because based on a wholly different state of facts. The court below specifically considered the *Art Metal* cases and correctly differentiated this case from them.

In the *Art Metal* cases the defendant had bribed Judge MANTON, who had written the opinions in both of the cases.* The decision in one of them, reversing the District Court, was by a divided "court". Upon application to the Circuit Court of Appeals, it recalled its "mandate", set aside the "judgments" entered pursuant thereto, and restored the cause to its docket for "re"-argument of the appeals. But this action in no way diminished the force of the rule of the *Nachod* case, *supra*, as the court below pointed out:

> "The procedure followed in the Art Metal cases, cited *supra*, does not derogate from this rule. There the vote of a judge of the Court of Appeals who had been corrupted in respect of that litigation was necessary to produce one of the two decisions in the appellate court between the same parties and involving the same patent, so that *no qualified court had really disposed of those appeals*; and, by the same token, *no competent mandates ever issued, hence, the term time was irrelevant*. The appeals were in effect treated as never having been *coram judice* theretofore. The orders thereupon entered in order to clear the record in the Art Metal cases of the former invalid action taken therein cannot properly be utilized to spell out power in a Circuit Court of Appeals to recall its mandate after the expiration of the term when no action has been taken within the term to continue the jurisdiction of the court. The view we thus take of the procedure followed in the Art Metal cases is confirmed by the fact that after the action taken therein looking to a *de novo* argument of

* 70 F. 2d 639; 70 F. 2d 641.

those appeals, the same court, composed of the same judges who had sat for the reargument of the Art Metals appeals and had disposed of them on November 20, 1939, just one month later (December 22, 1939) reasserted in the Nachod case, *supra*, the lack of power in a Court of Appeals to recall its mandate after the term has expired." (Opinion, R. pp. 249-250).

Examination of the proceedings in the Second Circuit Court of Appeals reveals that counsel for Art Metal, in seeking relief from the "judgments" which its adversary had bought and paid for, gave full recognition to the legal principle relied upon by the court below in the instant case, but differentiated from it, stating in their brief before the Circuit Court of Appeals that in the *Art Metal* cases:

> "No decree, therefore, was rendered by a duly constituted and completely disinterested court, and, in legal effect, no hearing was had by the plaintiff. The decrees, therefore, are void and a nullity."

The distinction between the power to set aside, after term, a void "judgment" and the lack of power to set aside, after term, a genuine final judgment by a properly constituted court is basic and has been carefully observed by the Circuit Court of Appeals for the Second Circuit itself. Thus, although that Court in the *Art Metal* cases exercised the power to vacate void "judgments" after the close of the term in which they were "entered", it recognized in immediately subsequent decisions that it had no power to vacate after term the judgment entered by a genuine court; *Beidler v. Photo-*

*stat Corporation,** certiorari denied 310 U. S. 648; *Nachod v. Engineering & Research Corporation, supra.*

It follows that there is no conflict between the *Art Metal* cases and the case at bar.

Third Point.

The judgment below is not in conflict with the decisions of this Court.

Petitioner contends that the judgment below is in conflict with *United States v. Throckmorton,* 98 U. S. 61, and *Marshall v. Holmes,* 141 U. S. 589. No conflict exists. Neither of those cases is authority for the proposition that an appellate court has the power to recall its mandate after the expiration of the term in which its judgment was entered and its mandate issued, even upon the ground of fraud. In both those cases original bills to obtain relief from judgments allegedly obtained by fraud were brought in courts of *original* jurisdiction. The court below in the case at bar specifically considered both cases and pointed out (Opinion, R. p. 250) that if Hazel feels itself aggrieved, the course is open to it to file an original bill to impeach the decree now standing against it in the District Court.

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* Here agents of Manton had unsuccessfully attempted to induce the petitioner to pay substantial sums to buy a favorable decision, informing the petitioner that unless a satisfactory arrangement was made, the case would be decided adversely to him. The Circuit Court of Appeals for the Second Circuit refused to recall its mandate and vacate its judgment after the close of the term in which it had been entered, and this Court denied certiorari.

As pointed out by the court below (Opinion, R. p. 250), it is only in the situation where an original bill has been filed in a court of original jurisdiction that the rule of those cases "as to whether the alleged fraud is extrinsic or intrinsic, becomes germane".

Petitioner contends (Petition p. 21) that there was extrinsic fraud in the Hazel infringement suit, because, specifically, it was "prevented 'from exhibiting' fully' * * * its case", but the fact is, as found by the court below and as shown above (pp. 4-5), that petitioner, with full knowledge of the facts, decided at the trial not to raise any question regarding the authorship of the Clarke article, feeling that to do so would merely emphasize the truth of its statements and so prove a boomerang. Moreover, neither in the present petition nor in the proceedings in the court below did petitioner undertake to specify any evidence, relating to any issue in the infringement suit, which it was "prevented from exhibiting fully".

The question as to what kind or degree of fraud will justify relief against a judgment allegedly obtained thereby is not germane to the ground of the judgment below upon which certiorari is sought, i.e., the lack of power of the court below to recall its mandate after the expiry of the term of its entry.

The court below in holding that the alleged fraud was not material to its 1932 judgment found it unnecessary to distinguish between "intrinsic" and "extrinsic" fraud or to discuss the alleged conflict between the *Throckmorton* case and *Marshall v. Holmes*, but (Opinion, R. p. 248) relied on *Toledo Scale Co. v. Computing Scale Co.*, 261 U. S. 399, 421, where this Court said:

> "There has been much discussion as to whether extrinsic fraud is here alleged, and the case of United States v. Throckmorton, 98 U. S. 61, is cited and numerous other authorities since that case. We do not find ourselves obliged to enter upon a consideration of the sometimes nice distinctions made between intrinsic and extrinsic frauds in the application of the rule, *because in any case to justify setting aside a decree for fraud whether extrinsic or intrinsic, it must appear that the fraud charged really prevented the party complaining from making a full and fair defense. If it does not so appear, then proof of the ultimate fact, to wit, that the decree was obtained by fraud, fails.*"

Clearly, there is no conflict between the judgment below and either *United States v. Throckmorton* or *Marshall v. Holmes*.

Fourth Point.

Petitioner's contention, that the decision of the court below raises "a jurisdictional question of great importance to the administration of justice that should be settled by this Court", is wholly without merit.

Under the amended prayers of the petition below, the Court of Appeals was asked to inquire into the alleged fraud and either (1) to recall its mandate and rehear the infringement suit or, alternatively, (2) to grant leave to petitioner to take proceedings in the District Court for setting aside and vacating the decree (R. p. 173). The alternative prayer was plainly equivalent to a prayer for leave to file a bill of review.

The Court of Appeals held that the petition was not meritorious and dismissed it, at the same time pointing out to petitioner that it had the right to file an original bill in a court of original jurisdiction, if it chose to do so.

Petitioner having failed to present to the Court of Appeals a case even *prima facie* sufficient to move that court to give leave to file a bill of review in the District Court, cannot now be heard to say that a great jurisdictional question is raised because the Court of Appeals also refused to recall its mandate and rehear the infringement suit ten years after the term had expired.

Fifth Point.

There is no question of public interest involved.

The decision in any patent case is always *in personam,* never *in rem.* Only the parties to the infringement suit below were concluded by the judgment. Any member of the public not a party or privy to the infringement suit, affected by this particular patent, may defend against it on the grounds of invalidity and non-infringement, and may make such use of the Clarke article as he sees fit. Even the petitioner is free, as pointed out by the court below, to bring an original suit in a court of original jurisdiction and make what use it can of the Clarke article.

Petitioner is in reality belatedly seeking a reargument of the issues fully litigated in the infringement suit, on the basis of the Clarke article. But no contention has been made that the Clarke article as published was not entirely true. Nor has petitioner pointed to any evidence relating to any of the issues in the infringement suit which it was deprived of exhibiting below. Peti-

tioner has had its day in court with respect to those issues, and they were determined against it.

At the trial of that case petitioner chose not to reveal to the court its knowledge as to the Clarke article. Nine years later, after it had been deprived for the time being of the profits it had been deriving from the settlement agreement it had voluntarily entered into after the 1932 judgment, it changed its mind.

Petitioner has now had a hearing as to the effect of the authorship of the Clarke article, and as to petitioner's standing to present to a court its unsubstantiated claim of recently acquired knowledge thereof, and both issues—neither of which would present a proper question for review by this Court—were determined against it. We respectfully submit that petitioner has no standing to seek a further review by this Court.

Conclusion.

The petition for certiorari should be denied.

Respectfully submitted,

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November, 1943.

APPENDIX

The truth of the Clarke article.

In the seventeen years during which the Clarke article has been under scrutiny, no one has found any inaccuracy in the article *as published. The article, as published, was and is entirely true, a fact which petitioner does not deny here and did not deny at any time in the proceedings below.* The article was based upon, and largely compiled from, the published annual Proceedings of the glass-workers' union. Its truth is attested in the record by the Clarke affidavit of 1932 (R. p. 111), by the Maloney affidavit of 1935 (R. p. 112), by affidavits of Dorsey (R. p. 114), Hatch (R. p. 85), and Brown (R. p. 75); and by admission of petitioner's counsel (R. p. 213).

The preparation and publication of the Clarke article.

Sometime in 1925 or early in 1926, Herbert Knox Smith (since deceased), then Secretary and General Counsel of Hartford, requested R. F. Hatch, an employee of Hartford, to search for certain data as to the manufacturing cost of glassware in 1913, which Mr. Smith desired to have in connection with some tax proceedings. The search so requested was made, and in connection therewith, Mr. Hatch consulted the annual printed Proceedings of the Glass Bottle Blowers Association of the United States and Canada. He observed that they contained a very complete story of the development of automatic machinery for feeding molten glass and the effect that such automatic machinery had exerted upon the glass manufacturing industry, especially the unionized workers therein. Believing that such proceedings con-

tained material from which could be compiled an article of interest to the glass manufacturing industry, he asked for and received permission to compile such an article.

As the article was to deal with the introduction of automatic glass-making machinery from the point of view of labor, Mr. Hatch desired to have it sponsored by an informed labor official and published, hoping that it would be of interest to the industry and a commercial advertising advantage to Hartford as presenting a connected story, which was not then generally known, of the effect on the glass industry of the introduction of automatic machinery (R. pp. 81-82).

Mr. Hatch obtained photostatic copies of pertinent extracts from said proceedings. He also consulted other sources of information to locate data as to the production of glass containers by the automatic Owens suction system and by the "gob feeding" system (which was then being commercialized and in respect to which Hartford had applications for patents pending), and the approximate relative production of containers by these two systems since they had respectively been put into commercial use. The article as written was based almost entirely on the said Proceedings (R. p. 82).

At that time there were two union officials familiar with the facts involved, one of whom, James Maloney, was the President of the Glass Bottle Blowers Association, and the other of whom was William P. Clarke, President of the American Flint Workers' Union (R. p. 82).

After the article was drafted, it was submitted to several persons for criticism and correction, including Henry W. Carter, patent attorney of the Owens Bottle

Company, Mr. Maloney and Mr. Clarke, all of whom satisfied themselves of its accuracy before publication.

The article was originally criticized in some respects by Mr. Carter, who pointed out some seeming inaccuracies (R. p. 84), as, for example, the statement of the Association as to the number of Owens machines in use (R. p. 84). It was subsequently (before it was revised by Clarke) changed by Hatch to meet such objections as were well founded (R. p. 84). In its final form, it was approved by Mr. Carter with certain suggested changes stated by him to be "of a trivial nature and hardly need mentioning" (R. p. 129). *The text of the article as published was entirely true* (R. pp. 247-8, 75-6, 85, 111, 112, 114).

In respect to the chart appended to the article (R. p. 200), Mr. Carter said he had concluded the previous criticism he had made of it "was without much foundation" and that Mr. Baker, the Treasurer of the Owens Company, thought that in its final form it was "about as accurate as could be arrived at" (R. p. 129). If anything, the chart was an understatement adverse to Hartford, because all feeder production of pressed ware was omitted, so as to draw a true comparison with Owens Bottle machine production, which latter did not include pressed ware.

Hatch submitted a draft of the article to Clarke prior to May 24, 1926 (R. p. 125). When the article was left with Clarke, the understanding was "that he [Clarke] intended to rewrite this quite extensively" and that it was "to be actually his [Clarke's] own product, so far as possible" (R. p. 181). On his first examination of the article, Clarke told Hatch that some of the

statements which had been quoted from the proceedings of the Bottle Blowers' Association, "were not correct and that he would not use them in his draft of the article" (R. p. 127).

After the article had been checked and corrected by Mr. Clarke, he submitted it to Mr. Maloney (R. p. 131), and both of them being satisfied with its then accuracy, Mr. Clarke adopted it as his own, signed it, and released it for publication (R. p. 132). It was transmitted to the Budget Publishing Company, which published a trade paper known as the "National Glass Budget" and was printed in the July 17, 1926 issue of said publication in precisely the form into which Clarke had put it (R. p. 87).

Use of the Clarke article in the Circuit Court of Appeals.

The Hazel infringement suit was tried in April, 1929. The Clarke article was not separately offered in evidence in this case but appeared in the record as a part of the Patent Office file wrapper of the patent in suit, which was offered by Hartford and received without objection from Hazel-Atlas. The article was not referred to by anyone during the proceedings in the District Court.

The District Court filed its opinion on February 28, 1930, holding the patent not infringed. An appeal was duly taken and prosecuted by Hartford.

In Hartford's brief on appeal, reference was made to the aforesaid article but solely for the purpose of showing that the Peiler invention "broke the Owens domination" (R. pp. 200-201), that is to say, opened up the field theretofore dominated by the Owens automatic

bottle machine. In the same paragraph of the brief wherein reference to the said article was made, other record references were given supporting the proposition that the Peiler invention "broke the Owens domination". Hazel's brief made reply to this part of Hartford's brief only to the extent of criticizing the *chart* annexed to the article as "entirely misleading" and stating that *"this chart"* was not competent evidence against the defendant, "being merely part of *ex parte* statements made in Hartford's behalf during the Patent Office proceedings" (R. pp. 201-2). No point was made respecting the initial authorship of the article and, aside from the said criticism of the chart, no criticism was made of any of the statements in the article itself; nor was it asserted or suggested in Hazel's brief or otherwise to the court or to counsel for Hartford that Mr. Clarke was not the author thereof or that it was improper for Hartford to refer to the article in its brief because it had been written initially by Mr. Hatch. No reference was made to the article in Hartford's reply brief.

The opinion of the Circuit Court of Appeals reversing the District Court was filed May 5, 1932. While extracts from the Clarke article were quoted in the majority opinion of that court, no reference was made therein to the chart which, as before stated, was the only part of the publication which Hazel-Atlas' brief criticized.

In the later case, *Shawkee Manufacturing Co. et al. v. Hartford-Empire Co.*, in which a petition for certiorari has recently been filed (No. 423 October Term, 1943), the question of the authorship of the Clarke article was called to the attention of the Circuit Court of Appeals by the Shawkee defendants in 1933 while Shawkee's appeal

was under advisement by the court and awaiting decision, and also in an application for rehearing, after the case was decided. The circumstances relating to the Shawkee case are more fully discussed in respondent's brief in opposition to the Shawkee petition for certiorari.

Hazel's knowledge in 1929 that Hatch had initially drafted the Clarke article.

In or prior to 1929, Messrs. Wood and Wood, Cincinnati lawyers, told representatives of Hazel-Atlas that Hatch had written the article and revealed that "they had been so told by Clarke and also by Hatch" (Philbin affidavit attached to original Hazel petition, R. p. 16).*

During the trial of the Hazel-Atlas suit in 1929, Mr. Edmund P. Wood discussed the Clarke article with Hazel's counsel and other representatives (R. p. 212). The counsel, experts and guiding officials of petitioner discussed the matter between themselves during the course of the trial, with a view to determining whether or not they should establish the facts in the record (R. pp. 212-213). After full consideration, petitioner's counsel, Mr. Philbin, decided not to make any attack upon the article or its authorship because (a) the facts contained in it as to the wide-spread use and commercial success of the Hartford type of feeder were freely admitted by everyone and could not be successfully controverted, and (b) "an attack on the article

* Clarke's statement on the matter might well be classified as hearsay so far as concerns Hartford, but the Hatch statement was obviously an admission and provable as such.

might be a boomerang" in that it might emphasize the truth of those parts of it which were of any possible pertinence. In other words, Hazel elected at the trial not to attack the article because Hazel's counsel believed that its authorship was unimportant and that any attack on it would merely emphasize its truth (R. p. 213).

These facts appear without contradiction from the affidavit of Edmund P. Wood (R. p. 211), a lawyer who was attending the trial of the case on behalf of Nivison-Weiskopf Company, another infringer. His client's interests paralleled those of Hazel-Atlas, and in that situation Mr. Wood was present at the time Mr. Philbin elected to remain silent regarding the Clarke article. The majority opinion of the court below so holds (Opinion, R. pp. 243-4).

Hazel's further knowledge in 1932. Its election to abandon any attack upon the authorship of the Clarke article.

In May, 1932, two weeks after the opinion of the Circuit Court of Appeals was rendered, Hazel procured executed affidavits from William R. Wood and Edmund P. Wood revealing the essential facts as to the genesis of the article and that Mr. Hatch had freely admitted its authorship (R. p. 37, p. 41). *These affidavits were both entitled in the appeal in the instant case* but were never filed or called to the attention of the Circuit Court of Appeals or Hartford's counsel until the filing of the original petition herein on November 19, 1941.

Also in May, 1932, Hazel employed one McCarthy to make a further investigation of the Clarke article. On

May 13 and May 24, 1932, McCarthy interviewed Clarke at Toledo. Clarke refused to produce his records or to give McCarthy "a signed statement containing all the facts relating to the preparation and publication of the 'Budget' article based on the records in his possession", but said that "every word of that article is true and I will stand by it", and "of course if I am subpoenaed I will give all the facts as I know them" (R. p. 29, p. 34). No steps were taken to subpoena Clarke, and McCarthy apparently had no interest in procuring Clarke's affidavit that the article was true.

Notwithstanding the knowledge that Hazel had in the year 1929, during or prior to the trial of this action, that both Hatch and Clarke had advised the Messrs. Wood that Hatch had written the article and caused it to be published in the National Glass Budget, and the knowledge conveyed to it by the affidavits of the Messrs. Wood, procured shortly after the opinion of the Circuit Court of Appeals was rendered, no effort was made to lay before that court the fact that the article had been written initially by Mr. Hatch and not by Mr. Clarke, or to seek a rehearing or reversal of the decision of the Circuit Court of Appeals on that ground, although five separate extensions of the time to apply for rehearing were allowed (Opinion, R. p. 245). Nor did Hazel-Atlas ever seek to ascertain from Hartford, or from Hatch, whether the article had been written by Clarke or by Hatch.

On July 21, 1932 Hazel entered into an agreement with Hartford (having an effective date of July 1, 1932) whereby (a) Hazel paid to Hartford $1,000,000, received from Hartford a license under Hartford's patents and agreed to pay for said license royalties at Hartford's standard royalty rates, granted Hartford a non-

exclusive license under Hazel's patents, and released Hartford from any claims for past infringement of Hazel's patents, both those owned by it and those under which it had rights; and (b) Hartford gave to Hazel a release from all claims for past infringement of Hartford's patents and agreed to pay to Hazel during the life of the agreement one-third of its net income from the "licensed inventions", as defined in the agreement, over and above the sum of $850,000 per annum. The agreement was to extend until January 3, 1945 unless sooner terminated, which by its terms could be done by Hazel at any time upon six months' notice to Hartford.

Hazel and Hartford operated under their 1932 agreement from the time of the execution thereof until the present time, with an exception to be hereinafter noted, and as a result thereof, Hazel has received from Hartford, up to December 31, 1940, a total of $678,422.26 more than Hartford has received from Hazel, including the million dollars paid to Hartford at the time of the execution of the said agreement (R. p. 186).

Hazel has never renounced the agreement or taken any steps to cancel or annul it, nor has it availed itself of the cancellation provision thereof. All the provisions of said agreement, except as restrained by a certain impounding order to be mentioned presently, have remained in full force and effect, and each party continues to enjoy the benefits of the other's inventions.

Hazel's reason for changing its position in 1941 and for applying for the relief now sought.

On December 11, 1939, the United States of America filed a complaint in the United States District Court for the Northern District of Ohio, Western Division, against Hartford, Hazel and ten other corporate defendants and a large number of individuals, alleging violation of the anti-trust laws of the United States. In that suit, a cancellation of the said Hartford-Hazel agreement was ordered by the District Court on the ground that it violated the Anti-trust Acts. Both Hazel and Hartford contend, and always have contended, that the said agreement is lawful and does not violate the Anti-trust Acts, and should not be set aside. Said suit is now in this Court on direct appeals by Hartford, Hazel and other defendants, Nos. 7-16, October Term, 1943.

During the course of those proceedings, a motion was made by the plaintiff to impound the monies payable under that agreement by Hazel to Hartford and by Hartford to Hazel. On May 9, 1941, an impounding order was made over the objection of both Hartford and Hazel, since which time the monies payable by Hartford and Hazel, respectively, to each other have been paid, pursuant to said order, to the Clerk of the United States District Court for the Northern District of Ohio, Western Division, with exceptions in the case of Hartford not here material.

Being thus deprived of the profits which it had been realizing for nine years under its contract with Hartford, Hazel began the proceedings now sought to be reviewed, by filing its petition of November 19, 1941 in the Circuit Court of Appeals. That court correctly said (Opinion,

R. p. 245) that Hazel remained inactive from 1932 to 1941.

Hartford's payment of money to Clarke in August 1932.

In July, 1932, Clarke failed of re-election as president of his Union, and on July 22nd, in conversation with Hatch, told the latter of a series of misfortunes that he had suffered; that the Union's bank of which he had been president had been closed; that he had lost his position as president of the Union; that he was faced with financial trouble and needed quick assistance; that he thought he was morally entitled to assistance from Hartford because he had done work for it previously for which he had never asked to be paid and never had been paid; that he thought he could do additional work for Hartford in the way of furnishing statistical and other information as to the production of glassware; that he had spent a good deal of time in connection with the aforesaid published article; that he had been bothered somewhat by investigators; and that he wanted $10,000 (R. p. 88).

This was Clarke's first and only request for money from Hartford. *It was made after Hazel-Atlas had made its contract with Hartford.*

Mr. Hatch was not authorized to speak for Hartford and so advised Mr. Clarke (R. p. 88). Subsequently, in August, 1932, Hartford agreed to employ Clarke under a retainer contract for a period of five years, paid him at that time a total of $8,000 (R. p. 90), and thereafter he did work for Hartford from time to time, for which

he was paid additional compensation as provided in the agreement, plus out-of-pocket expenses (R. p. 90).

Factual errors in the petition and in the dissenting opinion below.

The instant petition and the dissenting opinion below include important factual errors, including the following:

(1) The opinion of Judge Buffington, far from showing "on its face" (Petition, p. 2) that the Clarke article had any determinative influence on the outcome, shows that the conclusion of the court was based strictly on "the proofs" which did not include the Clarke article. In the case at bar the majority opinion of the court below specifically so holds (Opinion, R. p. 248).

(2) The petition (p. 3) states that *"the facts* concerning this article *were first revealed* in the summer of 1941 * * *". A similar claim is made on page 9. But the record is clear, as pointed out in the foregoing outline of events, that Hazel knew in 1929, and in 1932 as well, of the only material fact, namely, that the Clarke article was initially drafted by Hatch and not by Clarke.

(3) Petitioner asserts at various places, e. g., Petition, pp. 5, 21, that the article was referred to in Hartford's brief in the Circuit Court of Appeals in the hope of "poisoning", and did in fact "poison", the minds of the judges of the court. But the undisputed fact is that the article is entirely true; and, as pointed out in the opinion of the court below (Opinion, R. p. 244), the *only* criticism made in the Hazel brief was that a chart, forming a part of the article, was "misleading" and was "not competent evidence" against Hazel.

(4) Petitioner concedes (Petition, p. 7) that through Edmund P. and William R. Wood, it had learned in 1929 of the origin of the Clarke article. Petitioner's suggestion that "this was purely hearsay" (Petition, p. 7) is clearly erroneous. It was plainly *an admission* by Hatch and, in any event, had Hazel chosen at the trial of the case to challenge the authorship of the article, it could readily have called Hatch and Clarke as witnesses. This it did not do, either during the trial in the District Court, or after the decision of the Court of Appeals, although it then could readily have obtained leave to take depositions of Clarke and Hatch if it had regarded the initial authorship of the Clarke article as material or important.

(5) Hazel-Atlas' petition (p. 9) implies that Hazel entered into its license agreement with Hartford in July, 1932 because it was "faced with this situation"; namely, lack of ability to prove authorship of the article. There is no factual support for the suggestion. The agreement was a *cross*-licensing agreement, highly profitable to Hazel. It was not until six months after the order impounding the monies receivable by Hazel under it was entered by the District Court in Toledo—when the agreement for the first time became *un*profitable to Hazel, that it saw fit to initiate this proceeding by the filing of its original petition (Opinion, R. p. 245).

(6) Petitioner's reference (Petition, p. 12) to proceedings in the Shawkee case is incomplete. The facts, found by the court below (Opinion, R. pp. 246-7), are that Shawkee was not only well informed as to the essential facts but called them to the attention of the Court of Appeals while the Shawkee appeal was still under consideration. And, although that court was thus in-

formed, not only did it reassert the holding of validity of the Peiler patent which it had reached in the Hazel case, but Judge WOOLLEY, who has dissented in the Hazel case, filed a special concurrence, a thing which it is certain he would not have done had he felt either (a) that the origin of the Clarke article had had any material bearing on the outcome of the Hazel-Atlas case or (b) that it was of any intrinsic importance.

The dissenting opinion below evidences clear misapprehension of the facts of record:

(1) It states (R. p. 259) that "the heart and essence of the fraud" was that:

> "Apparently, at no place in the proceedings of the Bottle Blowers Association, to which Hatch referred, was any reference made to gob-feeders; viz., to devices such as Peiler's. * * * those proceedings in fact make no reference to them, * * *."

But "devices such as Peiler's", including feeders of Peiler's own design, are referred to in many places in the Bottle Blowers Proceedings, as quoted in the record herein. For example, the "Hartford-Fairmont Flow", and also another Peiler feeder called the "Hartford Single Feeder", are referred to in the proceedings as quoted on page 231 of the record. On the same page, reference is made to the "gob process", and to the "Hartford Multiple Feeder".

Other references by name to Hartford-Fairmont Peiler feeders are found in the proceedings quoted in the record at pages 236-239 inclusive. Also, installations of Hartford-Fairmont and Hartford-Empire Peiler feeders are referred to by the names of the manufacturers using them at several places in the proceedings, as quoted in the record at pages 235-6, 237-8.

Other "devices such as Peiler's", viz., reciprocating inger feeders which drop gobs or mold charges freely o molds, are referred to in the Proceedings as quoted pages 231, 237-9, being there identified as Howard, ller, Illinois - Pacific, Nivision - Weiskopf, O'Neill, eves, etc.

It is thus apparent that, while neither the union oceedings nor the Clarke article emphasize feeders arketed by Hartford any more than others, and do not fer to Peiler's invention as such, (Peiler is not even entioned in either), still the dissenting opinion is ainly wrong in stating that the proceedings do not fer to "devices such as Peiler's".

(2) Another factual error in the dissenting opinn, which apparently accounts for the caustic holding of aud in that opinion, is the statement (R. p. 261):

"At about this time, May 20, 1932, Clarke demanded of Hatch or Hartford-Empire the sum of $10,000."

arke's only request for money was made *two months ter,* viz., on July 22, 1932 (six years after the article as published), as is shown by the Hatch affidavit (R. . 89-90), and by the Brown affidavit (R. p. 79). This fference in dates is important because of the further atement in the dissenting opinion (R. p. 261):

"In connection with the payment to Clarke, Hatch wrote Carter a letter dated May 28, 1932,"

ıd because of the reference in the dissenting opinion R. p. 261) to

"* * * the other letters written by Hatch to officers of Hartford-Empire and Owens-Illinois Glass Company at this time, * * *"

which the dissenting judge thought, quite mistakenly, had reference to the payment of money to Clarke, but which were all written in May, 1932, before any question of payment had arisen.

(3) Again, on page 257 of the record, the dissenting opinion states:

> "The Court thought that the Clarke Article represented the opinion of members of a labor union in respect to a labor saving device * * *"

as if this were untrue. It is perfectly true. The article did and does represent the union's opinion, as is shown by the affidavits of Clarke (R. p. 111), and of Maloney (R. p. 112), by the Clarke-Maloney correspondence (R. pp. 130-132), and by the printed Union Proceedings (R. pp. 219-239 incl.).

(4) Still another factual error of importance in the dissenting opinion is the statement (R. p. 258) that "a deliberate intention to avoid truthfulness" is shown by a letter written by Hatch in which he said, in part:

> "I prepared the article so far as possible with reference only to the proceedings of the Bottle Blowers Association and knowingly and intentionally I reproduced some of the errors found therein."

In making this quotation, it was evidently overlooked that the quoted statement referred to a preliminary draft of the Clarke article, and that the errors were corrected before the article was published, so far as correction was possible. See Hatch affidavit (R. p. 85). As shown above, the Clarke article *as published* was entirely true and correct, and the instant petition does not deny this fact.